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Office-Supreme Court, U.S.
FILED
MAR 30 1981
ALEXANDER L. STEVAS, CLERK

No. 80-1640

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA, PETITIONERS

v.

STEVEN SHOLLY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WADE H. MCCREE, JR.
Solicitor General

LOUIS F. CLAIBORNE
Deputy Solicitor General

JOSHUA I. SCHWARTZ
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

LEONARD BICKWIT, JR.
General Counsel

STEPHEN F. EILPERIN
Solicitor

E. LEO SLAGGIE
MARK E. CHOPKO
Attorneys

Nuclear Regulatory Commission
Washington, D.C. 20555

QUESTION PRESENTED

Whether Section 189(a) of the Atomic Energy Act of 1954, 42 U.S.C. 2239(a), authorizes the Nuclear Regulatory Commission to amend an operating license for a nuclear power plant without first holding a hearing if one has been requested, where the Commission determines that the amendment presents no significant hazards consideration.

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The Solicitor General, on behalf of the United States Nuclear Regulatory Commission and the United States, petitions for a writ of certiorari to review the judgment of the United States Court of

* Petitioners in the court of appeals, respondents in this Court, were Steven Sholly, Donald Hossler and People Against Nuclear Energy. Respondents in the court of appeals were the United States Nuclear Regulatory Commission, its five member commissioners: John Ahearne, Victor Gilinsky, Richard T. Kennedy, Joseph M. Hendrie, and Peter A. Bradford, and the United States. In this Court the United States and the Nuclear Regulatory Commission are petitioners. The individual commissioners have been omitted as petitioners because their inclusion would be superfluous. Intervenor-respondents in the court of appeals were Metropolitan Edison Co., Jersey Central Power & Light Co. and Pennsylvania Electric Co.

Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-27a) and the Statement on Denial of Rehearing En Banc by dissenting members of the court (App. B, *infra*, 28a-46a) are not yet published.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, 47a-48a) was rendered on November 19, 1980. Timely petitions for rehearing and a suggestion for rehearing en banc were denied on March 4, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 189(a) of the Atomic Energy Act of 1954, 42 U.S.C. 2239(a), provides in pertinent part:

> In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit * * * the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. The Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application * * * for a construction permit for a facility * * *. In cases where such a construction permit has been issued following the holding of such a hearing, the Commission may, in the absence of a request therefor by any person whose interest may be

affected, issue an operating license or an amendment to a construction permit or an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such thirty days' notice and publication with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

STATEMENT

This case arose on consolidated petitions for review of two orders of the Nuclear Regulatory Commission, issued June 12, 1980, pertaining to measures to be taken as part of the cleanup effort in the aftermath of the March 28, 1979, accident at Unit 2 of the Three Mile Island nuclear power plant in Pennsylvania (TMI-2). Specifically, the Commission issued (1) a "Memorandum and Order" (App. D, *infra*, 49a-61a) authorizing release of radioactive krypton-85 gas from the reactor containment building into the surrounding atmosphere and (2) an "Order for Temporary Modification of License" (App. E, *infra*, 62a-67a) which amended the TMI-2 operating license by temporarily replacing the then existing limits on releases of radioactive gases with new limits expressed in terms of actual radiation measured outside the plant, designed to provide equivalent health protection (App. A, *infra*, 6a-7a & nn.7, 8).

In the aftermath of the accident at the TMI-2 nuclear power plant, the Nuclear Regulatory Commission ("NRC") undertook a series of regulatory actions and environmental studies to guide and control

the cleanup process (see App. A, *infra*, 3a-8a & n.1, *infra*). One of the problems addressed was an accumulation of radioactive gas in the reactor containment building which inhibited maintenance and cleanup (App. A, *infra*, 3a). Alternative strategies for overcoming this problem were reviewed in an environmental assessment circulated for public comment beginning March 25, 1980. See 45 Fed. Reg. 20265 (1980). After consideration of public comment, the NRC issued a final environmental assessment, concluding that venting of the krypton-85 gas to the atmosphere was the best course of action. The NRC implemented that conclusion by issuing the "Memorandum and Order" (App. D, *infra*, 49a-61a) and "Order for Temporary Modification of License" (App. E, *infra*, 62a-67a) on June 12, 1980.

No hearing was held on either order prior to its issuance. The Commission believed that no hearing was required on the Memorandum and Order authorizing commencement of purging ("the venting order") because that order merely restored pre-existing license authority that had been suspended following the TMI-2 accident, and accordingly did not constitute an amendment to the TMI-2 operating license, subject to the hearing provisions of Section 189(a) of the Atomic Energy Act, 42 U.S.C. 2239(a).[1] Under

[1] Inasmuch as the release of certain radioactive gases, such as krypton, is a normal part of the operation of a nuclear power reactor, the operating licenses of all nuclear power plants, including TMI-2, permit such release. In response to the March 1979 accident, however, after assuring that the TMI-2 reactor was in a safe and stable cooling condition, the NRC suspended the Metropolitan Edison Co.'s authority to operate TMI-2 and required that the plant remain shut down. 44 Fed. Reg. 45271 (1979). On February 11, 1980, NRC expressly prohibited venting of the reactor containment build-

the order, venting was not to begin for at least 10 days, so as to allow people who wanted to leave the vicinity an opportunity to do so.

As its caption implies, the second order affecting the TMI-2 cleanup issued by the Commission on June 12, 1980, the "Order for Temporary Modification of License," was treated as an amendment to the TMI-2 operating license by the Commission. However, the Commission found that the substitution of performance standards based directly on actual dosage, for the pre-existing limits in the TMI-2 license based on release rates designed to indirectly achieve the same level of protection, "involve[d] no significant hazards consideration" (App. E, *infra*, 65a). Accordingly, while noting that any interested person affected by the "Order for Temporary Modification of License" could request a hearing thereon, pursuant to 10 C.F.R. 2.714, the Commission provided that the license amendment would be effective immediately and that "[a] request for a hearing will not stay the effectiveness of this Order" (App. E, *infra*, 66a).

On June 16, 1980, the respondents, including interested citizens residing near the TMI-2 plant, requested that NRC reconsider its finding of "no significant hazards consideration" and its decision to make the June 12 orders effective immediately. Having received no response by June 23, 1980, respondents filed a petition for review of the two June 12,

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ing until subsequently approved by the Commission. 45 Fed. Reg. 11282. The June 12 Memorandum and Order authorizing venting provided that approval, based upon the intervening environmental review, and the Commission's conclusion that venting could be carried out consistent with its statutory mandate to protect the health and safety of the public (App. D, *infra*, 57a-58a).

1980, orders.[2] The court of appeals denied emergency injunctive relief sought by respondents to forestall commencement of venting, on June 26, 1980. The next day, respondents lodged a request with NRC for a hearing on the two June 12 orders. That request was referred to an Atomic Safety and Licensing Board (ASLB) pursuant to 42 U.S.C. 2241. Venting actually began on June 28. On July 3, respondents moved the ASLB to suspend venting, but withdrew this request on July 8. The purging process was completed on July 10, 1980. (App. A, *infra*, 7a-8a.)

Proceedings continued in the court of appeals. The respondents there argued that: (1) the venting order improperly authorized venting of krypton to the atmosphere, (2) the Commission's decision that the license modification order entailed no significant safety questions was arbitrary, and (3) each of these orders had been issued without a prior hearing in violation of Section 189(a) of the Atomic Energy Act, 42 U.S.C. 2239(a).[3] In response, the NRC and intervenors Metropolitan Edison Co., *et al.*, argued that: (1) the petitions for review had been mooted by completion of the venting process, there being little likelihood of repetition of the need for extraordinary venting at TMI-2, (2) the venting order was reasonable, consistent with applicable Commission regulations, and was not an amendment to the TMI-2 operating license, and (3) the temporary license modification had properly been determined to involve "no significant hazards consideration," and was properly

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[2] The Commission denied the request for reconsideration on June 26, 1980.

[3] A separate petition for review had been filed in the Third Circuit on July 8, 1980, and had been transferred to the D.C. Circuit and consolidated with the petition first filed there, upon the NRC's motion.

issued without offering or holding a prior hearing or giving prior notice of the action in the Federal Register, under the authority conferred by the last sentence of Section 189(a).[4]

The court of appeals reversed, holding that the final sentence of Section 189(a) of the Atomic Energy Act does not permit the Commission to dispense with a hearing prior to approval of a license amendment, even when the Commission determines that the amendment presents no significant hazards considerations, and that the provision in question authorizes only omission of some form of notice where a "no significant hazards consideration determination" is reached by the Commission (App. A, *infra*, 13a-22a). Concluding as well that the June 12 venting order was a license amendment subject to Section 189(a) (App. A, *infra*, 23a-25a), the court declared that NRC was required to hold a hearing prior to issuance of the venting order and the temporary license modi-

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[4] The United States, separately joined and represented as a respondent in the court of appeals pursuant to 42 U.S.C. 2239(b), 28 U.S.C. 2342(4), 28 U.S.C. 2344, and 28 U.S.C. 2348, argued that the question whether Section 189(a) permits the NRC to dispense with a prior hearing where the Commission determines that a license amendment entails "no significant hazards consideration" was capable of repetition, but would not generally evade review, and that this case was therefore moot. In addition, the United States suggested that the petitioners' withdrawal of their request for suspension of purging rendered the case moot. However, the United States agreed with the respondents that the last sentence of Section 189(a) does not permit the Commission to dispense with a hearing prior to approval of a license amendment if one is properly sought in a timely manner, notwithstanding a determination that "no significant hazards consideration" is presented by an amendment. The United States has reconsidered its position and accordingly now joins the Nuclear Regulatory Commission as a petitioner herein.

fication order (*id.* at 26a).[5] In support of its interpretation of the concluding sentence of Section 189(a), the court of appeals relied upon language in *Brooks* v. *Atomic Energy Commission*, 476 F.2d 924, 927 (D.C. Cir. 1973), while discounting a contrary statement in *Union of Concerned Scientists* v. *Atomic Energy Commission*, 499 F.2d 1069, 1084 n.36 (D.C. Cir. 1974), as unconsidered *dictum* (App. A, *infra*, 15a-16a & n.18). The court also concluded that the "plain language of section 189(a) dispels any notion that by a finding of 'no significant hazards consideration' the NRC may dispense with the hearing requirement" (App. A, *infra*, 16a). Support for this interpretation was adduced from the legislative history of 1962 amendments to Section 189(a) which added the penultimate sentence of that provision, while contrary legislative history proffered by the Commission was discounted (App. A, *infra*, 17a-22a). The court declined to defer to the Commission's interpretation of the statute, stating that the statute was unambiguously inconsistent with the Commission's view (*id.* at 21a-22a n.26).

The NRC and the intervenors petitioned the court of appeals for rehearing; the intervenors suggesting en banc reconsideration. The petitions and suggestion were rejected on March 4, 1981, with four members

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[5] The court of appeals rejected the petitioners' contentions that this case was moot, concluding that the issue presented was " 'capable of repetition, yet evading review' " (App. A, *infra*, 8a-13a) and that the respondents' withdrawal of their request for a stay of venting (see page 6), *supra*) did not prevent adjudication (App. A, *infra*, 26a n.28). The court of appeals also held, *sua sponte*, that the respondents' informal expressions of opposition to the venting plan constituted a timely request for a hearing prior to approval of any amendment to the TMI-2 license facilitating venting sufficient to trigger their statutory hearing rights under Section 189(a) App. A, *infra*, 21a n.25).

of the court dissenting from the denial of rehearing en banc, and urging reconsideration of the holding that NRC may not dispense with a prior hearing upon determining that a contemplated license amendment entails no significant hazards considerations (App. B, *infra*, 30a). Concluding that NRC's practice under its interpretation of Section 189(a) "complied fully with statutory mandates," and that the panel's opinion "ignored logic and distorted the legislative history of that section," the dissenting judges asserted that the panel's action "raises an issue of 'exceptional importance'" (App. B, *infra*, 34a, 36a & 30a, quoting Fed. R. App. P. 35(a)). Moreover, the dissenters suggested that "[u]nder the rubric of statutory interpretation, the panel has made a policy decision of major consequence" which by "reversing long-standing NRC policy * * * forces a major reallocation of Commission resources, which appears likely both to overwhelm the agency's hearing machinery and divert attention from safety issues of greater significance" (*id.* at 30a, 31a). The dissenters accordingly concluded that the panel's decision violates this Court's "unanimous mandate in *Vermont Yankee* rejecting judicial imposition of administrative procedures upon an agency in excess of the statutory minima prescribed by Congress" (*id.* at 31a).

The court of appeals stayed issuance of its mandate for a period of thirty days from the denial of rehearing pending filing of this petition for certiorari.

REASONS FOR GRANTING THE PETITION

This case presents a question of interpretation of the Atomic Energy Act of substantial practical importance.[6] The court of appeals' decision disregards

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[6] Petitioners seek only review of the court of appeals' holding that Section 189(a) does not permit the Commission

the key item of legislative history which demonstrates Congress' awareness, at the time it enacted the provision of Section 189(a) now in dispute, of the Commission's practice of dispensing with hearings on license amendments entailing "no significant hazards consideration," and that Congress intended to codify that practice when it enacted the 1962 amendments to the Atomic Energy Act. Not only does the decision below conflict with the intent of Congress, it fails to give appropriate weight to a longstanding agency interpretation of its governing statute, expressed in published decisions and regulations for twenty years. If permitted to stand, the court of appeals' decision will force a radical alteration in agency practices for regulating usage of nuclear energy, and may cause curtailment of nuclear power plant operation for reasons unrelated to any safety issue presented by nuclear power.

1.a. At least as early as 1960, the Atomic Energy Commission, predecessor to the NRC, adopted the position that it could dispense with a hearing prior to approving a license amendment determined to present "no significant hazards considerations." *General Electric Co. (Vallecitos Boiling Water Reactor)*, 1 A.E.C. 541, 543 (1960). With the encouragement of

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to dispense with a hearing prior to acting on a license amendment determined to involve no significant hazards considerations. Although the petitioners believe that the court of appeals' holding (App. A, *infra*, 23a-26a) that the separate Memorandum and Order authorizing venting was a license amendment subject to the provisions of Section 189(a) was erroneous, review is not sought of that conclusion in this petition. The latter aspect of the decision below rests in large part upon the court of appeals' characterization of the Commission's intention in prohibiting venting on February 11, 1980 (App. A, *infra*, 23a-25a; see note 1, *supra*), and lacks the general importance of the ruling which is the subject of this petition.

Congress, see Joint Comm. on Atomic Energy, 87th Cong., 1st Sess., *Improving the AEC Regulatory Process*, Vol. I, 73 n.4 (Comm. Print 1961), the *Vallecitos* rule was codified at 10 C.F.R. 50.59 on June 9, 1962. 27 Fed. Reg. 5492-5493 (1962). These regulations provided, 10 C.F.R. 50.59(e)(2) (1963):

> If the Commission determines that the proposed change * * * does not present significant hazards considerations * * * it may authorize such change * * * without a prior public hearing * * *.

b. The legislative history of the 1962 amendments to the Atomic Energy Act demonstrates that Congress was aware of and approved this rule. The present text of Section 189(a), 42 U.S.C. 2239(a), consists of four sentences, the last of which is the subject of this petition. Only the first sentence of Section 189(a) was found in the Atomic Energy Act of 1954 as originally enacted. 68 Stat. 955-956. The balance was added by a 1962 amendment. 76 Stat. 409.[7] As the court of appeals recognized (App. A, *infra*, 17a-19a), the 1962 amendments relieved the Commission of the obligation to hold hearings on issuance of operating licenses and amendments to construction permits and operating licenses for nuclear power plants for which a construction permit has already been issued after a hearing, where no one seeks a hearing on the subsequent action. H.R. Rep. No. 1966, 87th Cong., 2d Sess. 8 (1962); S. Rep. No. 1677, 87th Cong., 2d Sess. 8 (1962).[8] However, contrary to the decision below, this was not the sole purpose or effect of the

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[7] An earlier version of the second sentence of Section 189(a), not material here, was added in 1957. 71 Stat. 579.

[8] The Senate and House reports are virtually identical, being the product of the Joint Committee on Atomic Energy.

1962 amendment to Section 189(a). Curtailment of the mandatory hearing procedure was effectuated by the addition of the second and third sentences of Section 189(a). The fourth sentence, however, had the separate effect of adopting the *Vallecitos* rule codified at 10 C.F.R. 50.59 (1963), as is indicated in the Joint Committee Report on the bill discussing the amendment to Section 189(a).

> [T]his section will eliminate the requirement for a mandatory hearing, except upon the application for a construction permit for a power or testing facility. Under this plan, the issuance of amendments to such construction permits, and the issuance of operating licenses and amendments to operating licenses, would be only after a 30-day public notice and an offer of a hearing. In the absence of a request for a hearing, issuance of an amendment to a construction permit, or issuance of an operating license, or an amendment to an operating license, would be possible without formal proceedings, but on the public record. It will also be possible for the Commission to dispense with the 30-day notice requirement where the application presents "no significant hazards consideration." *This criterion is presently being applied by the Commission under the terms of AEC Regulation 50.59.*

S. Rep. No. 1677, *supra*, at 8; H.R. Rep. No. 1966, *supra*, at 8 (emphasis added). Thus Congress expressly endorsed the Commission's regulation permitting it to omit hearings prior to acting on proposed license amendments which entail no significant hazards consideration.[9]

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[9] The court of appeals disregarded the language emphasized above, deleting it entirely from the excerpt of this passage reproduced in its opinion (App. A, *infra*, 19a). Other

2. Contrary to the court of appeals' statement, the result reached below is not required by the language of Section 189(a). As the court of appeals acknowledged, its conclusion that the authority to dispense with notice contained in the final sentence of Section 189(a) does not include authority to omit the corresponding hearing, renders the statute paradoxical, for "it is difficult to imagine how a hearing can be requested when the NRC issues a license amendment without notice" (App. A, *infra*, 16a-17a n.20). Whether or not individuals manage to learn of agency plans in time to seek a hearing without any formal notice or publication, and whether or not some independent provision of law might impose a notice requirement of some kind as the court of appeals suggested—questions not presented here—it may be doubted that Congress deliberately sought to discourage individuals from learning of agency action in time meaningfully to exercise the right to a hearing, where such a right exists. The only tenable reading of the final sentence of Section 189(a) is that no hearing is required prior to approval of a license amendment in circumstances where the Commission is

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legislative history cited by the court of appeals cannot overcome this plain indication of congressional intent to codify the Commission's practice. The court of appeals relied primarily on the fact that the primary avowed purpose of the 1962 amendments was to limit the mandatory hearing requirement (App. A, *infra*, 17a-19a). But this evidence does not establish that no other purpose was effectuated. *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 592 (1980). Other statements cited by the court of appeals (App. A, *infra*, 21a-22a) appear to refer to the third sentence of Section 189(a) and, in any event, must give way to the more specific statement of congressional intent concerning the last sentence of the amended provision found in the Committee Reports.

authorized to dispense with notice of its plans to act: the obvious purpose of a notice requirement is to protect and make meaningful a right to a hearing. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 173-175 (1974).

3. The court of appeals erroneously failed to defer to the NRC's long-standing interpretation of Section 189(a). That interpretation, announced in *Vallecitos*, *supra*, and codified at 10 C.F.R. 50.59 (1963) prior to its endorsement in the 1962 amendment to the Atomic Energy Act, was reaffirmed shortly after adoption of the amendment. 10 C.F.R. 50.58(b), 27 Fed. Reg. 12186 (1962). And it has been a part of the agency's published regulations continuously, to this date. See 10 C.F.R. 50.58(b).[10] This "'contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new,'" which was scrutinized and approved by Congress at its inception, commands particular deference. *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408 (1961), quoting *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).[11]

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[10] Proposed regulations at 45 Fed. Reg. 20491 (1980) make explicit the Commission's willingness to entertain requests for an after-the-fact hearing on amendments determined not to present a significant hazards consideration. The court of appeals expressly noted its view that these regulations are *ultra vires* (App. A., *infra*, 22a n.26).

[11] The court of appeals' reliance upon *Brooks* v. *Atomic Energy Commission*, *supra*, 476 F.2d at 927, to the exclusion of *Union of Concerned Scientists* v. *Atomic Energy Commis-*

Unlike the Commission's "practical administrative construction" of the disputed statutory provision, to which the court of appeals was bound to give substantial weight, *Power Reactor Co.* v. *Electricians, supra*, 367 U.S. at 408, the interpretation of Section 189(a) propounded by the court below would frustrate the purposes of the Atomic Energy Act by imposing substantial and novel administrative burdens on the Commission, which threaten the viability of the existing system of regulation of nuclear power production, power production itself, or both (App. B, *infra*, 31a-34a). The Nuclear Regulatory Commission reports that it has approved more than 1600 amendments to nuclear power plant operating licenses which, it determined, entailed no significant hazards consideration, in the past four years. The annual average of more than 400 amendments per year reflects the detailed regulation of nuclear power plant operation carried out by the Commission. A nuclear power plant operating license, like that for the TMI-2 plant includes hundreds of pages of highly detailed technical specifications. Any change in any of the technical specifications requires an amendment to the operating license. 10 C.F.R. 50.59(a)(1), (c). Minor changes must be made frequently to accommodate routine events in the operation of a nuclear power plant. For instance, where a power plant is refueled, an event which occurs approximately every eighteen

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sion, supra, 499 F.2d at 1084 n.36, was unwarranted (see App. B, *infra*, 36a-38a). The applicable language in *Brooks* was at most an alternative holding, for there the court held that the Commission could not rely upon the last sentence of Section 189(a) as authority to omit a hearing, because the Commission had not determined that no significant hazards consideration was presented by the order at issue.

months, the technical specifications must usually be adjusted to reflect the slightly different behavior of the fresh fuel placed in the reactor core. The need for a variety of other minor license changes, such as amendments extending the time allowed for conducting tests, frequently arises.

Under the court of appeals' decision, each of these minor license amendments must be held in abeyance if a hearing is requested, notwithstanding the fact that the Commission reaches a written, reasoned, judicially-reviewable determination that the amendment entails no significant safety question. As a practical matter, it would be difficult, and in some cases impossible, for the Commission to provide a prior hearing in time to complete processing of all of the required license amendments presenting no significant hazards consideration before the changes must be implemented. The Commission informs us that in the past four months some twenty nuclear power plants would have had to shut down or operate at reduced power if they were not accorded in a timely fashion the authority sought in a license amendment which, the Commission concluded, presented no significant hazards consideration. Ironically, the decision of the court of appeals could interfere with implementation of a range of new operating license requirements developed by the Commission in response to the TMI-2 accident. Minor adjustments in such requirements, necessary to adapt those reforms to conditions at particular power plants, would have to be deferred pending a hearing, if one is requested, under the decision below. The court of appeals erred by failing to adopt the Commission's practical construction of Section 189(a) which permits interested parties to obtain a hearing after a license amendment entailing no significant hazards consideration has been approved.

Inasmuch as the Commission's practice was consistent with Congress' intentions in enacting Section 189(a) of the Atomic Energy Act, imposition of more exacting and burdensome requirements for administrative practice was impermissible. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 543, 548 (1978); *Steadman* v. *SEC*, No. 79-1266 (Feb. 25, 1981), slip. op. 13.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

LOUIS F. CLAIBORNE
Deputy Solicitor General

JOSHUA I. SCHWARTZ
Assistant to the Solicitor General

LEONARD BICKWIT, JR.
General Counsel

STEPHEN F. EILPERIN
Solicitor

E. LEO SLAGGIE
MARK E. CHOPKO
Attorneys
Nuclear Regulatory Commission

MARCH 1981